IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

O R D E R

Shiv Narayan Sharma Vs. State of Rajasthan & Anr.

S.B.CR. MISC. PETITION NO.1851/2007

DATE OF ORDER :: December 05, 2007

PRESENT

HON'BLE MR.JUSTICE H.R.PANWAR

Mr.C.P.Soni, for the petitioner.

BY THE COURT:

By the instant Cr. Misc. Petition under section 482 Cr.P.C., the petitioner has challenged the order dt. 4.10.2007 passed by the Additional Sessions Judge (Fast Track) No.1, Pali (for short `the revisional court' hereinafter), whereby the revision petition filed by the petitioner against the order dt. 31.1.2007 passed by the Additional Chief Judicial Magistrate, Jaitaran (for short `the trial court' hereinafter) reading over the accusation for the offence under section 138 of the Negotiable Instruments Act, 1881 (for short `the Act' hereinafter), was dismissed.

I have heard learned counsel for the petitioner. Carefully

gone through the order passed by the trial court as well as by the revisional court.

It is contended by the learned counsel for the petitioner that the cheque in question has been stolen by respondent No.2 for which a report has been lodged with the police and the cheque was not dishonoured on the ground of insufficient fund but it was dishonoured as the petitioner got the stop payment recorded with the Bank and a direction to stop the payment was issued to the Bank. This question as to whether the cheque was issued by the petitioner in favour of respondent No.2 or it was stolen by the respondent No.2 as also as to whether the petitioner had sufficient fund in his account has to be gone into and decided by evidence. The petitioner may have a defence as the contention raised herein but such a defence has to be established by evidence.

The controversy with regard to the stop payment came to be considered by the Hon'ble Supreme Court in M/s M.M.T.C. Ltd. & Anr. Vs. M/s Medchl Chemical & Pharma P. Ltd. & Anr., 2001(2) Apex Court Journal, 636 (S.C.), wherein the Apex Court held that an offence is made out. However, an accused can prove that `stop payment' was not due to insufficiency or paucity of funds but payment was stopped because of other valid

causes including that there was no existing debt or liability at the time of presentation of cheque then offence u/s 138 is not made out. But this question can only be gone into at the trial. The Apex Court observed as under:

> "Just such a contention has been negatived by this Court has, in the case of Modi Cements Ltd. v. Kuchil Kumar Nandi reported in (1998) 3 SCC 249. It has been held that even though the cheque is dishonoured by reason of `stop payment' instruction an offence under section 138 could still be made out. It is held that the presumption under Section 139 is attracted in such a case also. The authority shows that even when the cheque is dishonoured by reason of stop payment instructions by virtue of Section 139 the Court has to presume that the cheque was received by the holder for the discharge, in whole or in part, of any debt or liability. Of course this is a rebuttable presumption. The accused can thus show that the "stop payment" instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there was sufficient funds to clear the amount of the cheque for encashment at the drawer bank and that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out. The important thing is that the burden of so proving would be on the accused. Thus a Court cannot quash a complaint on this ground."

Keeping in view the decision of the Hon'ble Supreme Court

in M/s M.M.T.C. Ltd. & Anr. Vs. M/s Medchl Chemical & Pharma P. Ltd. & Anr. (supra), in my view, both the courts below were justified in passing the orders impugned. It cannot be said that the orders impugned would result in serious miscarriage of justice or abuse of process of Court.

Consequently, the petition is dismissed.

[H.R.PANWAR],J.

m.asif/-

S.B.Cr.Misc. Stay Petition No.1510/2007

In

S.B.Cr.Misc. Petition No.1851/2007

(Shiv Narayan Sharma Vs. State of Rajasthan & Anr.)

Date of order : December 05, 2007

HON'BLE MR.H.R.PANWAR,J.

Mr.C.P.Soni, for the petitioner.

Since the main petition has been dismissed, stay petition also stands dismissed.

(H.R.PANWAR),J.

m.asif/-